Supreme Court, U.S.
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No. 99-1960

IN THE

Supreme Court of the United States

ENRIQUE MARUGÁN GIRÓ,

Petitioner,

v.

BANCO ESPAÑOL DE CRÉDITO S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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21 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly applied the proximate causation test announced in *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258 (1992), to dismiss a claim under the Racketeer Influenced and Corrupt Organization Act in which: (*i*) all of the alleged predicate acts involved a Spanish judge, acting in a Spanish court against a Spanish citizen, and (*ii*) the only effects in the United States are alleged lost profits suffered over two years later upon the sale of property owned by a company in which petitioner is the shareholder?

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent Banco Español de Crédito S.A. states that Banco Santander Central Hispano S.A. owns ten percent or more of Banco Español de Crédito S.A.

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COUNTERSTATEMENT OF JURISDICTION

The District Court dismissed this case for lack of subject matter jurisdiction, because "the instant controversy involves an alleged scheme by a Spanish bank to extort money from a Spanish citizen where all of the relevant conduct took place in Spain, and did not have a substantial direct effect in the United States . . . ." [Dist. Ct. Dec. at 17a.][1] The Court of Appeals similarly found that "[b]ecause Marugán has not alleged sufficient facts to show proximate cause under [the Racketeer Influenced and Corrupt Organization Act ("RICO")], he also has not alleged enough to establish extraterritorial jurisdiction." [Ct. App. Dec. at 8a n.2.] The issue of extraterritorial application of RICO is discussed by some courts as one of subject matter jurisdiction. As a result, the subject matter jurisdiction of this Court is an issue fairly presented by the Petition. The impropriety of applying RICO extraterritorially to the facts pled in this case is discussed in detail in Point I of the argument below.

COUNTERSTATEMENT OF THE CASE

A. Counterstatement of the Facts Alleged in the Complaint

This case involves an alleged scheme by a Spanish judge named Luis Pascual Estevill to use his position to extort bribes from potential criminal defendants in Spain and an alleged conspiracy involving respondent Banco Español

1. Numbers appearing within square brackets refer to the Petition for a Writ of Certiorari ("Petition" or "Pet.") and to the Court of Appeals decision ("Ct. App. Dec.") and District Court decision ("Dist. Ct. Dec.") attached as appendices to the Petition.

de Crédito S.A. (known in Spain as "Banesto") in that scheme. Petitioner Enrique Marugán Giró allegedly was converted from a witness in a legal proceeding initiated by Banesto into a criminal defendant when the assigned judge was away for vacation. Although petitioner claims to have been the object of the extortion scheme, his complaint does not allege that he was ever asked by a conspirator to pay a bribe. Rather, he alleges that he heard of the bribery scheme from another victim. While he claims to have refused to pay any bribe, he does not allege that he ever communicated that fact to any conspirator. The criminal charges against petitioner were dropped after the assigned judge returned from vacation, less than four weeks after the charges were brought.

Petitioner claims that his refusal to make a payment to Judge Pascual prompted the conspirators to take retaliatory steps against him by notifying the media of the warrant issued for his arrest. His complaint also alleges that the conspirators caused the story to be sent to Extebank, a lender with whom he dealt. He claims that Extebank refused to provide him with a requested loan as a result of the publicity. Almost three years after the publicity — long after the charges against petitioner had been dropped, after the Spanish judge who perpetrated the scheme had been convicted of extortion and jailed in Spain, and after petitioner already had begun a lawsuit against the Spanish judge in a United States court — petitioner claims that because of the events alleged in the complaint, he was forced to sell a building in New York City for less profit than he otherwise had hoped to obtain. The building, which sold for more than its purchase price, was owned not by petitioner, but by a corporation in which he was the sole shareholder.

B. Counterstatement of the Proceedings Below

In proceedings below, respondent not only argued that petitioner failed to plead facts sufficient to give rise to subject matter jurisdiction, but also argued that petitioner lacked standing to sue because his alleged injuries were mediated through a company that he owned and were far removed in place and time from the alleged predicate acts. Respondent also argued that petitioner failed to properly plead a RICO pattern, had suffered no cognizable injury under RICO and, as to petitioners' state law claims, that they should be dismissed as time barred. Respondent also argued that the case should be dismissed on grounds of *forum non conveniens*.

The District Court ruled that RICO did not apply extraterritorially to the conduct alleged. Analyzing the issued under both the conduct and the effects tests that have been applied in similar cases, the District Court held that all of the conduct described in the Complaint had taken place in Spain and that the effects alleged to have taken place in the United States were "too remote and indirect to confer jurisdiction" on the Court, because any effects in the United States were mediated through at least four intermediate effects. [Dist. Ct. Dec. at 15a.] The District Court therefore dismissed the case under Fed. R. Civ. P. 12(b)(1), without reaching respondent's other grounds for seeking dismissal. [*Id.* at 17a.]

The Court of Appeals, in a summary order that appears in the Federal Reporter as a table decision and that may not otherwise be cited as precedent, Second Circuit R. 0.23,[2]

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2. Second Circuit Rule 0.23 provides that "in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, (Cont'd)

analyzed the facts alleged by petitioner in light of RICO's standing provisions and found that the "three years between the alleged fraud" and the claimed loss, "the number of independent intervening actions and decisions by third parties," and the "disconnect between the alleged harm that eventuated (the sale of a U.S. property at a loss) and that which was immediately intended (the payment of a bribe to a judge)" meant that petitioner "failed to allege facts that would show that he was injured 'by reason of' the Bank's actions under . . . RICO." [Ct. App. Dec. at 7a-8a.] The Second Circuit added that because petitioner "has not alleged sufficient facts to show proximate cause under RICO, he also has not alleged enough to establish extraterritorial jurisdiction." [*Id.* at 8a n.2.][3]

(Cont'd)
disposition will be made in open court or by summary order." The rule adds that such summary orders "do not constitute formal opinions of the court" and therefore should "not be cited or otherwise used in unrelated cases before this or any other court."

3. This is the second federal lawsuit that petitioner has pursued in the United States against one of the alleged conspirators. On March 27, 1996, petitioner and a corporation that he owns commenced an action against Judge Pascual in the Southern District of New York. On February 18, 1998, the district court dismissed the case for lack of personal jurisdiction. *Giró v. Estevill*, 1998 WL 63407 (S.D.N.Y. 1998). The Court held that the connection between New York and Pascual's tortious acts in Spain was too indirect to support a finding of forseeability:

> While [Pascual] must have foreseen that his actions would have consequences in Spain, he could not have reasonably foreseen that his local actions in Spain against a Spanish citizen would cause emotional . . . injury in New York — a state in which plaintiff [Marugán] does not reside, in a country of which he is not a citizen. The connection is too remote.

Id. at *2.

REASONS FOR DENYING THE WRIT

Petitioner seeks review of the unsigned memorandum accompanying a summary order, because petitioner did not like the conclusions the Second Circuit panel drew after applying the proximate cause standard analyzed by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). The Second Circuit's ruling did not break any new ground. It did not offer a refinement or new interpretation of *Holmes*. It is a straightforward analysis of proximate cause under the *Holmes* standard. The Second Circuit ruled that petitioner "failed to plead facts" sufficient to meet the proximate cause requirements imbedded in RICO's standing provision, 18 U.S.C. § 1964(c). The panel's opinion cannot even be cited as precedent. Second Circuit R. 0.23. In short, the Second Circuit's decision is an unremarkable and entirely correct application of law to facts that does not warrant the attention of this Court.

I.

THE COURTS BELOW CORRECTLY HELD THAT RICO DOES NOT APPLY EXTRATERRITORIALLY TO ACTS BY A SPANISH JUDGE IN A SPANISH COURTROOM AGAINST A SPANISH CITIZEN THAT HAD NO DIRECT IMPACT ON PETITIONER IN THE UNITED STATES.

A. Numerous Independent Actions and Decisions by Third Parties Render Any Effect in the United States Too Attenuate and Remote to Warrant Extraterritorial Application of RICO.

This Court has recognized that Congress has the authority to enforce its laws beyond the territorial boundaries

of the United States and that "unless there is the affirmative intention of the Congress clearly expressed, [courts] must presume it is primarily concerned with domestic conditions." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (internal quotations omitted). No clear statement of Congressional intent is evident in RICO, making the propriety of its extraterritorial application highly questionable. The few courts that have applied RICO extraterritorially have looked for conduct necessary to the RICO conspiracy in the United States or, in the absence of such conduct, substantial effects in the United States. *See, e.g., North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996); *Alfadda v. Fenn*, 935 F.2d 475, 479-80 (2d Cir.), *cert. denied*, 502 U.S. 1005 (1991); *see also Gassner v. Stotler & Co.*, 671 F. Supp. 1187, 1189 (N.D. Ill. 1987).

In the present case, neither standard is satisfied. Petitioner alleges no conduct in the United States. The predicate RICO acts all took place in Spain, as the District Court found. [Dist. Ct. Dec. at 14a-15a.] The effect of which petitioner complains was mediated through a long series of other effects that render the connection between the alleged RICO conspiracy in Spain and the effects in the United States too attenuated and remote to warrant the application of RICO. The intermediate effects include at least the following:

1. There was the decision by the editor of *El Pais* in September 1995 to run a story based upon the news that petitioner was named as a defendant in the criminal proceeding.

2. There was the decision by a person at Extebank to read the article in *El Pais* and call petitioner.

3. There was petitioner's apparent inability, in an alleged emergency meeting, to convince Extebank that the charges did not present a real or significant issue.

4. There was the decision by Extebank — at a time not specified in the complaint — not to refinance the property in New York.

5. There was petitioner's apparent inability to convince another lender to refinance the property.

6. There was the need — almost three years later in 1997, long after the criminal charges against petitioner had been dropped and the Spanish judge put in jail — for petitioner's company to sell the property.

7. There was the alleged $1.9 million loss on the property, even though petitioner paid only $850,000 to purchase it and received $1.125 million upon its sale.

8. There was the resulting injury to the company that owned the property.

9. There was the diminution in value to the shares of the company held by petitioner — the effect for which he sues in this case.

These intermediate effects add emphasis to the simple fact that the effect highlighted by petitioner as the gravamen of his case — the diminished value of real estate in New York — was almost three years, thousands of miles and many steps removed from the alleged predicate acts in Spain. After analyzing these facts, the District Court concluded that the controversy did not involve a "substantial direct effect in

the United States" that properly could give rise to jurisdiction under RICO. [Dist. Ct. Dec. at 17a.] Similarly, the Second Circuit concluded that "the number of independent intervening actions and decisions of third parties" and the passage of almost three years made it "likely that 'the loss [was] attributable to events occurring in the interim.' " [Ct. App. Dec. at 7a (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995)).]

Even if Congress had evinced a desire to apply RICO extraterritorially, the Court of Appeals and District Court were entirely correct in determining on the record before them that RICO should not be so applied in this case.

B. This Court's Cases Do Not Alter the Analysis Merely Because Petitioner Claims that He Was the Direct Target of the Conspiracy.

Petitioner attempts to overcome the attenuated and inadequate connection between the events in Spain and the effect he alleges in the United States by saying that the "extortionate scheme was directed at [him] and not some third person." [Pet. at 10.] This contention alone cannot overcome the fact that no conduct took place in the United States and that the effects of the scheme in the United States resulted from many intervening decisions by outside parties. Moreover, even though he claims to be the intended victim of the bribery scheme, petitioner does not allege that he was asked directly for a bribe, but instead alleges that he heard about the bribery scheme from another victim. He also does not allege that he ever communicated his intention not to pay to anyone other than the same victim. Nevertheless, he alleges that his refusal to pay prompted the conspirators to publish information about the criminal proceedings in Spain.

Contrary to petitioner's contention [Pet. at 10], this Court's ruling in *Holmes* does not remove the proximate cause requirement from RICO simply because the extortionate scheme allegedly was "directed at" petitioner. The Court was clear in *Holmes* when it said that "our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry . . . ." 503 U.S. at 274 n.20. *Holmes* correctly requires a proximate cause analysis in all cases in order to show that the injury or effect felt by plaintiff is the "direct" result of the RICO predicate acts. The Petition attempts to recast this standard as one that merely requires the predicate acts to be "directed at" petitioner. [Pet. at 10.] *Holmes* makes it clear, however, that even the intended victim of the predicate acts cannot recover for every conceivable effect flowing from those predicate acts, but only for those proximately caused by them. *See Holmes*, 503 U.S. at 266 n.10 ("there is a point beyond which the wrongdoer should not be held liable" (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-477 (1982)); *see also id.* at 287 (Justice Scalia, concurring in the judgment) ("[l]ife is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith").

Contrary to petitioner's contention [Pet. at 7], therefore, the Second Circuit's ruling in this case is not at odds with this Court's prior rulings regarding application of RICO. Quite the contrary, this case is no more than an ordinary application of the proximate cause standard described in *Holmes* to the particular facts alleged by petitioner in his own complaint — a conclusion that is reinforced when the factors highlighted by the Court in *Holmes* are analyzed in light of the facts alleged here. 503 U.S. at 269 (citing

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 540 (1983)). In particular, in *Holmes* the Court identified the difficulty of ascertaining the amount of damages "attributable to the violation, as distinct from other, independent factors," as a reason why the proximate cause inquiry is required. 503 U.S. at 269. In this case, petitioner's alleged injury occurred almost three years after the underlying predicate acts and depended upon intervening decisions by independent bankers and others. Moreover, the injury complained of is in the form of lost profits upon the sale of real estate. Determining the extent to which those profits were legitimately anticipated and the extent to which they were lost as a result of respondent's actions, as opposed to market forces or other factors, will present precisely the kind of difficulty in ascertaining damages highlighted by the Court in *Holmes*. *See id.* at 271. In addition, the directly injured party — petitioner's real estate holding company — could vindicate its rights in an appropriate proceeding in Spain. Shoehorning this case into a RICO claim brought by a corporate shareholder in a United States District Court is unnecessary to the vindication of those rights, if any exist.

Petitioner points to no circuit court cases that support his claim that *Holmes* allows the intended victim of a predicate act to proceed without a showing of proximate cause. He does, however, refer to dicta in *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990), to suggest that the panel decision in this case is at odds with Second Circuit law. In making this argument, however, he ignores the more recent and explicit statements by the Second Circuit in its post-*Holmes* ruling in *Laborers Local 17 Health and Benefit Fund v. Phillip Morris, Inc.*, 191 F.3d 229, 241 (2d Cir. 1999), *cert. denied*, 120 S. Ct.

799 (2000), in which the court specifically *rejected* the assertion that "even if [plaintiffs'] claims fail the direct injury test, they should still have standing to sue because an exception to this rule exists where the defendants specifically intend to harm plaintiffs." *See also id.* at 242 ("an allegation of specific intent does not overcome the requirement that there must be direct injury . . .").[4]

Based upon the facts alleged, this case properly was dismissed as an inappropriate extraterritorial application of RICO, as both the Court of Appeals and District Court found upon consideration of petitioner's pleadings. [Ct. App. Dec. at 8a n.2, Dist. Ct. Dec. at 15a.]

II.

ANY INJURY TO PETITIONER IN THE UNITED STATES WAS TOO REMOTE, ATTENUATED AND INDIRECT TO GIVE PETITIONER STANDING UNDER RICO.

The same facts that rendered petitioner's claims too remote and attenuated to warrant extraterritorial application of RICO to this case also required dismissal under RICO's statutory standing provision.

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4. Even if the panel's decision in this case was at odds with prior Second Circuit law (and it was not), petitioner's proper remedy for such an intra-circuit issue would be to petition the Court of Appeals for rehearing or rehearing *en banc*. No such petition was filed in this case and this Court normally does not grant certiorari to resolve such intra-circuit issues. *Davis v. United States*, 417 U.S. 333, 340 (1974).

RICO provides a civil remedy only to those who are injured "by reason of" a RICO predicate act. 18 U.S.C. § 1964(c). Relying on this Court's analysis of similar language in Section 4 of the Clayton Act, the Court in *Holmes* said that this provision requires a RICO plaintiff to show that the predicate acts "proximately cause[d] the injury claimed." 503 U.S. at 276. Borrowing from *Associated General Contractors of California, Inc. v. California Council of Carpenters*, 459 U.S. at 540, the Court noted that the "directness of the relationship" between "the injury asserted and the injurious conduct" has been a "central element" of the Court's analysis of the "by reason of" requirement in Section 1964(c). *Holmes*, 503 U.S. at 268-269.

The injury alleged in this case is far from direct. Petitioner's alleged lost profits on the sale of real estate in New York City is several times removed from the alleged RICO predicate act of attempting to extort money in Spain. As highlighted by the Court of Appeals, the passage of almost three years between the alleged extortionate demand and the loss on the sale of real property in the United States, the intervening decisions of others (and of the New York real estate market) affecting the value of the real estate, and the disconnect between the immediately intended harm from the extortionate demand (obtaining a bribe) and the eventual injury (lost profits an ocean away) make it highly likely that the loss alleged in this case "is attributable to events occurring in the interim." [Ct. App. Dec. at 7a (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d at 772).]

Petitioner's claim to have standing under RICO is further undermined by the fact that he is attempting to pursue claims that more properly belong to the corporation that owned the real estate. That corporation, not petitioner, was the party

injured when the real estate allegedly was sold for lower profits. As the shareholder of that corporation, petitioner's injuries were, at most, indirect. It is black letter law that a shareholder has standing only where he has suffered injury distinct from that of the corporation or where the shareholder is owed a special duty separate and apart from that owed to the corporation. *See, e.g., Manson v. Stacescu*, 11 F.3d 1127, 1131-32 (2d Cir. 1993), *cert. denied*, 513 U.S. 915 (1994); *Ceribelli v. Elghanayan*, 990 F.2d 62, 63-64 (2d Cir. 1993). In this case, petitioner can point to no such distinct injury or special duty. Moreover, there is no exception to this rule for shareholders who claim that they were the target of the bad acts. *See Manson*, 11 F.3d at 1129 (no shareholder standing where shareholders claimed that defendants' acts "injured them personally" and that defendants "threatened [shareholder] with financial ruin and murder").

The propriety of the Court of Appeals decision is further reinforced by the fact that petitioner does not even allege a direct effort to extort money from him. Rather, the extortion attempt allegedly was directed towards another person (Rosal) who then informed petitioner of the scheme.[5]

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5. Under well-settled RICO precedent, the facts alleged do not constitute a RICO predicate act directed towards petitioner, because there was no "active demand or threat on the part of the government official" that was directed towards petitioner himself. *See United States v. Allen*, 155 F.3d 35, 44 (2d Cir. 1998). Judge Pascual's decision to name petitioner as a defendant may well have been a preparatory step in furtherance of an unrealized plan to extort money from him. But RICO only affords standing to those injured by preparatory acts that are also RICO predicate acts. *Hecht v. Commerce Clearinghouse, Inc.*, 897 F.2d at 25.

Petitioner's alleged injury is at best an indirect consequence of the Spanish conspiracy alleged in the complaint. The passage of time and the substantial number of intervening decisions and actions of others make it highly unlikely that the injury petitioner seeks to address occurred "by reason of" the predicate acts he alleges. This case properly was dismissed by the Court of Appeals and the District Court on the facts and the law. Further review by this Court is unwarranted and unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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